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ENVIRONMENTAL ASSESSMENT: CONFERENCE ON LAW AND PROCESS IN ENVIRONMENTAL MANAGEMENT

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TABLE OF CONTENTS

CANADA

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INTRODUCTION

In May 1993, the sixth Canadian Institute of Resources Law (CIRL) Conference was held in Ottawa. Its focus was on law and process in environmental management, and many of the papers presented dealt with current developments in environmental assessment law and practice in Canada and elsewhere.(1) This summary will touch on some issues addressed, including: expansion of the environmental assessment process; class assessments; policy assessment; judicial review; and inter-jurisdictional issues.

"Environmental assessment" is the process whereby a government determines which development proposals will be approved. These proposals could include large undertakings like hydroelectric plants or bridges, but might include smaller undertakings and even programs or policies. Assessment may also involve the revision of development plans to better accommodate and protect the natural assets that would be affected by a permitted project. At the federal level, and at most provincial levels in Canada, as well as in most other jurisdictions around the world, the environmental assessment process has in recent years been the subject of increasing attention.

The presenters and participants at the CIRL conference considered the environmental assessment process in light of the concept of sustainable development increasingly accepted since the June 1992 "Earth Summit," the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil. Since virtually all nations of the world have endorsed this concept, there is expected to be a corresponding evolution in the theory and practice of environmental assessment. Thus, the presenters who focused on environmental assessment for

(1) The Canadian Institute of Resources Law will publish all of the papers from the conference, probably by the end of 1993.

the most part examined the process in the context of an anticipated societal shift to policies and practices in line with sustainable development.

ENVIRONMENTAL ASSESSMENT IN CANADA

Across Canada, environmental assessment is recognized as an important decision-making tool in the planning and development process. Assessments within federal jurisdiction are conducted pursuant to the 1984 *Environmental Assessment Review Process* (EARP) *Guidelines Order*. Although Bill C-13, the *Canadian Environmental Assessment Act (CEAA)*, which will replace the EARP Guidelines Order, was passed by Parliament in June 1992, the package of regulations necessary to give effect to the legislation was not published until 18 September 1993. In the 60-day public comment period to which these regulations are subject, the many newspaper and periodical accounts of reaction to them have been overwhelmingly negative.(2)

At the provincial and territorial levels, a variety of environmental assessment regimes prevail. The federal environmental assessment scheme to be in place once CEAA is proclaimed will include some elements new to the typical Canadian environmental assessment regime, such as mediation as an alternative to panel review and the consideration of cumulative environmental effects. A further expansion of the process has taken place in a number of inter-jurisdictional forums such as land claim negotiations.

EXPANSION OF THE ENVIRONMENTAL ASSESSMENT PROCESS

At the opening plenary session of the CIRL conference, the presenters identified some developments that they anticipate may alter the environmental assessment process in Canada. The two initial speakers disagreed on whether environmental assessment should be expanded, either theoretically or practically. Peter Mulvihill, a doctoral candidate in Environmental Planning and Design at the Université de Montréal, advocated that the process be expanded to incorporate sustainable development theory.(3) This view was opposed by Michael Jeffery, a partner in the

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(2) Most of the presenters at the May 1993 CIRL Conference spoke with the expectation that Bill C-13 would be proclaimed in force before the federal election.

(3) His paper was co-written with Peter Jacobs, Faculté de l'Aménagement, Université de Montréal, and Barry

Toronto law firm Fraser & Beatty, on the grounds of what he sees as private sector dissatisfaction with environmental assessment procedures.

Peter Mulvihill outlined some of the evolutionary steps in the environmental assessment process since early efforts to include conservation and pollution considerations in development planning. Since 1975, social impact assessment has become more popular, and public participation has become an integral part of the process. The acceptance of the concept of sustainable development since the 1987 Brundtland Report has been particularly important. Now, virtually every Canadian jurisdiction has a formal environmental assessment process in place, and such processes have become more transparent, participatory and accessible.

In practice, the effectiveness of environmental assessment continues to be hindered by two problems, according to Mr. Mulvihill. First, there is a tension between science and theory, in that the assessment process cannot be objective and value-free, as we expect scientific data to be. Decisions will thus be made in a context of both objective, scientific data and selective cultural values. Also, the idea that assessments can be carried out in a one-time closed process, in which all the impacts of a project can be identified, predicted and mitigated before it is approved, conflicts with the inherent uncertainty associated with development and its biophysical and other effects.

To expand the environmental assessment process in light of a growing recognition of the need for a more continuing, adaptive approach, Mulvihill proposed a number of new directions, including: the ecosystem approach; pluralistic project planning for integrated and overlapping developments; policy assessments of the causes of unsustainable development; alternative dispute resolution, such as mediation, as provided for in CEAA; and less formal and interactive processes where appropriate.

Using the example of the site selection process provided in Ontario under its 1992 *Waste Management Act*, Michael Jeffery outlined the costs, time and litigation created by what he described as an inadequate process. While agreeing on the need for more prevention of negative environmental impacts, he urged that there be no expansion of the existing process without correction of the present practical problems.

Sadler, EcoSys Corp.

CLASS ASSESSMENTS

One of the innovations the CEAA will introduce to the federal environmental assessment process is "class assessment," the assessment of classes of undertakings or activities. Such assessment has already become a component of Canadian environmental assessment laws and processes in other jurisdictions, but its purpose and potential are uncertain. It has been presented as a method of avoiding the duplication of assessments of similar undertakings. Used to expand the environmental assessment process, this tool could consider classes of individually modest activities that might have significant overall effects, and might streamline the process for repetitive or continuous activities not requiring independent assessment. Robert Gibson, of the Faculty of Environmental and Resource Studies at the University of Waterloo, discussed the practice of class assessment as it is carried out under Ontario's *Environmental Assessment Act*.

Once a class has been defined, a special process is set out for all undertakings that fall within it. Experience with Ontario's four-year *Timber Management Class Assessment*, which Gibson described as a costly lesson, has made it clear that the class assessment process must become more efficient. For example, the hearing process used there may not have been appropriate for consideration of such broad policy questions. Gibson proposed that for groups of activities with potential environmental impacts the policy implications of the class should be identified, with specific undertakings then being considered in that context.

Derek Doyle, Director of the Environmental Assessment Branch of the Ontario Ministry of the Environment, while agreeing that the *Timber Management* case, and the quasi-judicial system in general, were expensive and time-consuming, suggested that the costs are an inevitable part of the democratization of the process. He pointed out that 4,000 to 5,000 decisions are made under Ontario's *Environmental Assessment Act* every year, of which 76% are class assessments. Only 1% require public hearings.

POLICY ASSESSMENT

Judith Hanebury, a lawyer for the National Energy Board, pointed out that site-specific assessment of projects may not reveal the impact of individually innocuous activities. Noting that the assessment of policies, plans and programs has been discussed in Canada since the

Brundtland Report recommended the incorporation of environmental considerations into all decision-making, Ms. Hanebury expressed disappointment with the status of policy assessment today.

At the federal level, policy assessment is governed by the non-legislated but Cabinet-approved 1993 document *Environmental Assessment Process for Policy and Programs Proposals*. Proposals to Cabinet with potential environmental effects and involving regulatory instruments will generally be assessed. The document provides for ministerial accountability, with the Minister of the Environment acting as a facilitator. The document does not require the outcome of assessments to be made public, but the fact that a policy has been assessed must be announced when the policy is released.

Ms. Hanebury described the policy assessment process, both federally and provincially, as requiring improvement. There is a need for agreement on the overall values that should be considered and applied in these assessments, such as what should be the guiding criteria for decision-making. There are also gaps in the data available and shortcomings in the substantive methodology to be applied; for example, how decision-makers should value the effects of policies on this and future generations and how they should weigh the local and global costs and benefits. Ms. Hanebury also recommends adoption of alternatives to traditional Cabinet secrecy, such as public participation in at least the initial part of the process.

JUDICIAL REVIEW OF ENVIRONMENTAL ASSESSMENT DECISIONS

Judgments by Canadian courts reviewing environmental assessment decisions have been interpreted as contributing to the increased legalization of Canadian environmental policy, according to Alistair Lucas of the Faculty of Law at the University of Calgary. After reviewing the important cases where the courts have reviewed the EARP Guidelines Order, he concluded that traditional judicial review reasoning was applied in most cases, and that Canadian courts have not engaged in the type of judicial activism seen in the United States under the *National Environmental Protection Act* (NEPA).

For example, Canadian courts have been cautious in granting remedies when finding that projects have been improperly assessed and have not granted mandatory remedies to shut down projects already started. In other aspects of judicial review cases, such as the right of parties to

standing before the court, the scope of judicial review, and the standard of review, the courts have followed principles applicable in other areas of law. Lucas did not predict any major shift in judicial approach once the new federal legislation has been proclaimed.

HARMONIZATION OF ENVIRONMENTAL ASSESSMENT PROCESSES

Another innovation in federal environmental assessment law that CEAA will introduce is harmonization of regimes by the federal and any provincial government(s). The status of efforts to harmonize environmental law and processes across Canadian jurisdictions was the topic of a paper presented by Stephen Kennett, of the Canadian Institute of Resources Law. His view is that such harmonization is being attempted as a solution to inconsistency and overlap between jurisdictions and as an alternative to constitutional amendment.

Kennett proposed three objectives for the harmonization of environmental law and practice: first, streamlining and simplifying existing processes; second, creating procedural certainty; and third, maintaining the integrity and basic standards of the systems already in place in the respective jurisdictions. He recommended that harmonized processes be kept simple, and should not necessitate the creation of new organizations or processes. He listed a series of factors in Canadian society that will likely serve as incentives to harmonization of environmental assessment processes, including the constitutional division of power to legislate in the area of environmental protection, political pressure from business and environmental groups to clarify processes and reduce duplication, and inter-governmental competition for decision-making power.

Legislation permitting the harmonization of environmental assessment processes is already in place in several Canadian jurisdictions, the most detailed provisions being in the federal and Alberta statutes. As Kennett pointed out, a general imprecision about how systems are to be harmonized allows a great deal of room for ministerial discretion in negotiating. A series of multilateral negotiations by the Canadian Council of Ministers of the Environment (CCME) has resulted in a model for bilateral agreements called the "Draft Framework for Environmental Assessment Harmonization (1992)."

Kennett outlined a series of requirements he sees as necessary to any bilateral harmonization agreement: criteria for deciding which process applies in cases of overlapping jurisdiction; specifics as to the process to be followed, including provision for public access and

participation; and an open process for the negotiation of any further agreements. A harmonization agreement that includes these elements may serve as a model for the environmental management of other legislative and policy areas involving overlapping jurisdiction.

CONCLUSION

At the federal level, legislators and officials are completing the regulatory package that will permit the proclamation of CEAA, the first legislated federal environmental assessment regime. Meanwhile, their counterparts in various other jurisdictions are wrestling with current processes and a number of reform options. Environmental lawyers, practitioners and advocates are developing proposals to enhance and expand existing processes, through many observers are expressing concerns about the effectiveness and efficiency of these processes. This work reflects a concerted effort by virtually all concerned in environmental protection to integrate the concept of sustainable development more fully into planning and development at all stages. For environmental assessment to be fully effective as a tool in the shift to sustainable development practices, it will require ongoing improvement and review.